BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:	
	Case No. 06-2004-158427
	OAH No: L2006060182
SEYMOUR P. KERN, M.D.	
Physician's and Surgeon's Certificate No. G 26212	
Petitioner.	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Medical Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective at 5:00 p.m. on April 27, 2009.

DATED March 27, 2009

MEDICAL BOARD OF CALIFORNIA

Barbara Yaroslavsky
Chair, Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **SEYMOUR P. KERN, M.D.** **Physician's and Surgeon's Certificate Number G 26212,** **Respondent.**	**Case No. 06-2004-158427** **OAH No. L2006060182**

PROPOSED DECISION

This matter came on regularly for hearing on February 17 and 18, 2009, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Complainant was represented by Wendy Widlus, Deputy Attorney General.

No appearance was made by or on behalf of Respondent despite his having been properly served with notice of the date, time, and place of the hearing.

Oral and documentary evidence was received. The record was closed on February 18, 2009, and the matter was submitted for decision.

FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. Complainant, David T. Thornton, made the Accusation in his official capacity as Executive Director of the Medical Board of California (Board)[1].

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[1] Mr. Thornton no longer serves in that capacity.

2. On December 24, 1973, the Board issued Physician and Surgeon's Certificate Number G 26212 to Respondent. The license was in full force and effect at all relevant times. It will expire on August 31, 2009, unless renewed.

The Prior Discipline

3. On September 16, 1992, another Accusation was filed against Respondent (Case No. D-4948). In that 29-page Accusation, Respondent was charged with Unprofessional Conduct, False Representations in a Medical Document, False and Fraudulent Medical Records, False or Misleading Advertising, False and Fraudulent Insurance Claims, Acts Involving Dishonesty and Corruption, Gross Negligence and Incompetence.

4. In a settlement, effective April 29, 1995, Respondent's physician's and surgeon's certificate was revoked, the revocation was stayed, and Respondent was placed on probation for a period of five years subject to certain terms and conditions. Those terms and conditions included passing an oral clinical examination in subjects involving General Ophthalmology and/or Radial Keratotomy, retention of a practice monitor, performance of 100 hours of community service at an ophthalmological/health facility, and completion of an ethics course. Respondent signed the settlement agreement on February 1, 1995.

5. Paragraphs 10 and 11 of the settlement agreement read:

> 10. Respondent, hereby freely, knowingly and voluntarily admits the manner in which he billed the insurance companies for his performing radial keratotomies as set forth in Accusation D-4948 was inaccurate and negligent, in violation of [Business and Professions Code] section 2234 (a) and (c).
>
> 11. Respondent further admits the manner in which he negligently advertised to the public that radial keratotomies would be covered by health insurance was in violation of [Business and Professions Code] section 2271.

6. Respondent successfully completed probation and, on May 12, 2000, the Division of Medical Quality of the Medical Board of California fully restored Respondent physician's and surgeon's certificate to clear status.

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The Current Action

7. At the administrative hearing, Complainant established the truth of paragraphs 6 through 14 of the Accusation, a description of Lasik eye surgery. Those paragraphs are repeated verbatim below and are incorporated herein as factual findings.

> 6. LASIK is an acronym for **La**ser-assisted In **S**itu **K**eratomileusis. It is a form of refractive laser eye surgery performed by ophthalmologists to correct vision and to reduce a patient's dependency on glasses or contact lenses. The procedure permanently changes the shape of the cornea, the clear covering of the front of the eye. Lasik is usually a preferred alternative to photorefractive keratectomy, PRK, as it requires less time for full recovery, and the patient experiences less pain overall.
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> 7. The LASIK technique was made possible by the development around 1970 of a device, a microkeratome, used to cut thin flaps in the cornea and to alter its shape, in a procedure called Keratomileusis.
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> 8. LASIK surgery was developed in 1990 by Dr. Lucio Buratto (Italy) and Dr. Ioannis Pallikaris (Greece) as a melding of two prior techniques, keratomileusis and photorefractive keratectomy. It quickly became popular because of its greater precision and lower frequency of complications compared with those techniques.
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> 9. In 1991, LASIK was performed for the first time in the United States by Drs. Stephen Brint and Stephen Slade. The same year, Drs. Thomas and Tobias Neuhann successfully treated the first German LASIK patients with an automated microkeratome.
>
> 10. Before the surgery, the surfaces of the patient's corneas are examined with a computer-controlled scanning device to determine their exact shape. Using low-power lasers, it creates a topographic map of the cornea. This process also detects astigmatism and other irregularities in the shape of the cornea. Using this information, the surgeon calculates the amount and locations of corneal tissue to be removed during the operation. The patient typically is prescribed an antibiotic to start taking beforehand, to minimize the risk of infection after the procedure.

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11. The operation is performed with the patient awake and mobile; however, the patient typically is given a mild sedative (such as Valium or diazepam) and anesthetic eye drops. Lasik is performed in two steps. The initial step is to create a flap of corneal tissue. This process is achieved with a mechanical microkeratome using a metal blade, or a laser microkeratome that creates a series of tiny closely arranged bubbles within the cornea. . . . A hinge is left at one end of this flap. The flap is folded back, revealing the stroma, the middle section of the cornea.

12. The second step of the procedure is to use an excimer laser to remodel the corneal stroma. The laser vaporizes the tissue in a finely controlled manner without damaging adjacent stroma by releasing the molecular bonds that hold the cells together. No burning with heat or actual cutting is required to ablate the tissue. The layers of tissue removed are tens of micrometers thick.

13. Currently manufactured excimer lasers use a computer system that tracks the patient's eye position up to 4,000 times per second, redirecting laser pulses for precise placement. After the laser has reshaped the cornea, the Lasik flap is repositioned over the treatment area by the surgeon. The flap remains in position by natural adhesion until healing is completed.

14. Performing the laser ablation in the deeper corneal stroma and under the Lasik flap "fools" the cornea into not knowing that it has had surgery. The wound response is muted, thus the patient is typically provided rapid visual recovery and virtually no pain.

8. In 2003, Respondent was the plaintiff's only expert witness in a civil medical malpractice lawsuit entitled *Chris Carlisle v. Andrew Castner, M.D., et al.*, Los Angeles County Superior Court Case No. SC 070593 (the civil action). On June 2, 2003, the defendant took Respondent's deposition in connection with that case.

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9. Except for the last phrase in subparagraph D, Complainant established the truth of the allegations set forth in paragraph 15, subparagraphs B through F of the Accusation, in connection with Respondent's deposition testimony in the civil action. Those allegations are repeated verbatim below and are incorporated herein as factual findings. The final phrase in subparagraph D is omitted.

> B. Respondent testified that a patient wearing hard or gas permeable contact lenses may have a "compressed cornea" and that cutting a flap (as one would do for LASIK) on that cornea releases a lot of hidden stresses and forces that cause the cornea to "pop" back close to its original shape. However, there is no scientific or physiological data to support this theory.
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> C. Respondent also testified that the standard of practice is that refractive surgeons should routinely under-correct patients that are long time contact lens wearers. However, there is no medically accepted data or scientific literature to support this statement.
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> D. Respondent claimed in his deposition, "I'm actually the inventor of the laser procedure myself. The LASIK is my patent." In fact, respondent did not invent the LASIK procedure, the history of which is commonly known. The first LASIK procedure was done in 1989 in Greece by Pillikaris . . .
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> E. Respondent claims, and testified in his deposition, that he has a patent for LASIK. In fact, respondent's patent is not for LASIK and has nothing to do with LASIK surgery. Respondent mentions in his patent the use of a laser to shape a lens blank or to create a recess in the cornea for a milled blank. LASIK does not use outside tissue nor does it remove tissue that would be replaced. Rather, an excimer laser is used to remove tissue for refractive purposes from the cornea while in its normal place (in situ). Nothing is added to the eye.
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> F. Respondent claims he is an expert in LASIK laser eye surgical techniques and he testified in his deposition that he had performed over 15,000 refractive procedures. Respondent later stated that he has not actually done a LASIK surgery procedure on his own, but that he was an "assistant." However, LASIK is a procedure that does not generally require an assistant.

10. Lasik surgery is performed by a single surgeon while looking through a microscope. The surgeon is assisted by a surgical technician who is not a physician. There is no room at the surgical table for an assistant surgeon.

11. In accordance with the credible testimony of Complainant's expert witness, Steven Liebowitz, M.D., Respondent's statements, made under oath, as reflected in paragraph 15, subparagraphs B and C of the Accusation, constitute gross negligence and incompetence.[2]

12. Respondent's statements, made under oath, as reflected in paragraph 15, subparagraphs D, E and F of the Accusation, were intentionally false and constitute dishonest acts.

Factors in Aggravation

13. According to his resume, published on his website, Respondent published "Kern's Rule of Fours" in the September, 1973 issue of Archives of Ophthalmology.[3] The entry implies that this was a scholarly article that was published following an appropriate peer review. It was not. It was a letter to the editor.

14. The defendant in the civil action was Andrew Caster, M.D. (Dr. Caster). Dr. Caster was overwrought when he learned of Respondent's deposition testimony because it was a "complete fabrication" (Dr. Caster's term), and he lost sleep over how a jury was to ascertain the truth when listening to the disparate testimony of the two expert witnesses. After two trial continuances, the case against Dr. Caster settled. The settlement was at least a partial result of the false, negligent, and incompetent testimony Respondent gave in deposition. Dr. Caster had to report the settlement to the National Practitioner Data Base, and he is required to explain it each time he seeks hospital privileges.

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[2] However, Dr. Liebowitz was not credible in his statements that Respondent was, or may have been, "psychotic" when he made certain claims. Dr. Liebowitz is an ophthalmologist. He did not establish any expertise in psychiatry or psychology, and he failed to otherwise demonstrate that he was competent to diagnose psychoses. Further, Dr. Liebowitz rendered his diagnosis of psychosis worthless by failing to specify the particular psychosis from which Respondent suffered. (The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, lists at least nine.) Further, Dr. Liebowitz did not take a history, perform a mental status exam, perform any psychometric testing or interview Respondent before "diagnosing" Respondent as "psychotic."

[3] Archives of Ophthalmology is a peer-reviewed journal.

15. As a result of the settlement and another pending lawsuit, Dr. Caster's insurance carrier cancelled his coverage, and he was unable to secure other malpractice insurance. When he was finally able to do so, the premium was 40 percent greater than that of his former policy. That increased premium totaled between $20,000 and $30,000.[4]

16. Respondent made other misrepresentations in his deposition as well. For example:

a. He initially testified that he received his medical doctorate from Albert Einstein College of Medicine. He later testified that he did not receive his medical doctorate from that medical school.

b. In describing his prior discipline, Respondent testified as follows:

> In 1995, there was a case involving insurance billing where I was held responsible for the acitivities of my insurance biller who did certain things that were not knowledgeable to me, but I was held responsible as the captain of the ship. And I was put on probation for five years by the Medical Board.
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> Subsequently after many, many years that was rescinded, because the Department of Insurance did an investigation and cleared me of any impropriety. In the meantime, I served, still put in the time. My practice was never suspended. I was just under probation.

c. Respondent's testimony was inaccurate and misleading in that his license discipline was never "rescinded." His medical license was revoked, the revocation was stayed, he was placed on probation, and he served the entire five-year probationary period. Whether or not the Department of Insurance investigated the matter, that agency did not, and could not "clear [him] of any impropriety" in connection with the disciplinary action brought by the Medical Board.

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[4] As was explained in *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053 [236 Cal.Rptr. 526], actual patient harm need not be shown before discipline may be imposed on a physician's and surgeon's certificate. The same applies in regard to Dr. Caster. Findings 14 and 15 do not establish a cause for discipline. However, they serve to explain the very human effect Respondent's deposition testimony had on Dr. Caster and the potential effect it could have had on the public had the case not settled. The findings are relevant to the issue of determining the appropriate discipline to be imposed on Respondent's license.

d. In addition, the Board did not discipline Respondent as the "captain of the ship" who was unknowingly responsible for the actions of another individual. Respondent admitted he had been negligent and inaccurate in his billings, and had been negligent in his advertising.

17. On September 30, 2005, Respondent was interviewed by a senior investigator and a medical consultant for the Board. During that interview, Respondent was shown a copy of his resume that had been downloaded from his website. One entry in the resume read: "1983-1985: Medical Director of KERN EYE INSTITUTE – A Medical Group, Inc., Newport Beach, California." Two entries below that entry read: "1983-1994: Currently: Kern Eye Institute, A Medical Group – 15,000 refractive surgeries. 9339 Genessee Ave., Suite 250, San Diego, CA 92121." When the discrepancy involving the inclusive dates Respondent was with the Kern Eye Institute, and the fact that he was not currently affiliated with Kern Eye Institute were pointed out to him, he assured the interviewers that he would change his resume on the website. On December 1, 2005, the investigator again checked Respondent's resume on his website. The two entries were identical to the way they appeared on September 30, 2005, the day of the interview.

LEGAL CONCLUSIONS

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (e), for dishonest acts that are substantially related to the qualifications, functions or duties of a physician and surgeon, as set forth in Findings 9, subparagraphs (D), (E), and (F), 10 and 12.

2. Cause does not exist to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (e), for dishonest or corrupt acts that are substantially related to the qualifications, functions or duties of a physician and surgeon, as set forth in Finding 9, subparagraphs (B) and (C). The statements Respondent made, as referenced in those subparagraphs were his medical opinions. They were negligent and incompetent, but Complainant did not prove they were dishonest.

3. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (b), for gross negligence, as set forth in Findings 9, subparagraphs (B) and (C), and 11.

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4. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (d), for incompetence, as set forth in Findings 9, subparagraphs (B) and (C), and 11.

5. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, for unprofessional conduct, as set forth in Findings 9, 10, 11 and 12.

6. Respondent's license is being disciplined for dishonesty not only because he committed dishonest acts by making deliberate misrepresentations during his deposition, but also because those dishonest acts were substantially related to the qualifications, functions and duties of a physician and surgeon. California Code of Regulations, title 16, section 1360 states:

> For the purposes of denial, suspension or revocation of a license, certificate or permit pursuant to Division 1.5 (commencing with Section 475) of the [Business and Professions Code], a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Medical Practice Act.

7. The dishonest act need not be related directly to patient care in order to show a present or potential unfitness to practice. In *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, the court stated:

> First of all, we find it difficult to compartmentalize dishonesty in such a way that a person who is willing to cheat his government out of $65,000 in taxes may yet be considered honest in his dealings with his patients. In this connection, however, we should point out that today's doctor deals financially with the government—state, local and federal—in many ways that have nothing to do with his own personal tax obligation . . . Above, all, however, there is the relation between doctor and patient. It is unnecessary to describe the extent to which that particular relationship is based on utmost trust and confidence in the doctor's honesty and integrity. (*Id.* at 470.)

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8. Similar reasoning, with respect to real estate salespersons, is equally applicable to physicians. In *Golde v. Fox* (1979) 98 Cal.App.3d 167, the court stated:

> The crime here, of course, does not relate to the technical or mechanical qualifications of a real estate licensee, but there is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice. (*Id.* At 176.)

9. Respondent engaged in dishonest acts while giving expert medical testimony under oath, during an interview conducted in connection with a Board investigation, and in his resume published on his website. The relationship of those acts to the qualifications, functions and duties of a physician and surgeon is both substantial and direct.

10. In giving his expert testimony, Respondent was entitled to express his medical opinions. However, "[T]he weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion." (Citation); its value "'rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion. . . .'" (Citation.) Such an opinion is no better than the reasons given for it (Citation), and if it is 'not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence.' (Citations.)" *White v. State of California* (1971) 21 Cal.App.3d 738, 759-760 [99 Cal.Rptr. 58].

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11. In order to qualify as an expert witness, the witness must show that he/she has the necessary education, training and experience, and a familiarity with the standard of care within the local medical community to render a competent opinion. This was explained more fully in *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 478 [234 P.2d 34]. The court stated:

> The definitive criteria in guidance of the trial court's determination of the qualifications of an expert witness are recognized in *Sinz v. Owens* . . . 33 Cal.2d 749, to rest primarily on "occupational experience," as stated at 753: "The proof of that standard (the reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances) is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as "occupational experience – the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood." (Citation.) He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured."

12. Respondent was not qualified to testify as an expert witness in Lasik surgery. He misrepresented his qualifications and then gave testimony completely unsupported by the medical community or the literature. In so doing, he was not only dishonest, he was grossly negligent and incompetent as well.

13. Gross negligence has been defined as an extreme departure from the ordinary standard of care or the "want of even scant care." (*Gore v. Board of Medical Quality Assurance* (1970) 110 Cal.App.3d 184, 195-198.)

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14. In *Pollak v. Kinder* (1978) 85 Cal.App.3d 833, 837-838 [149 Cal.Rptr. 787], the court explained the distinction between negligence and incompetence in the medical context. The court stated:

> The technical term "incompetency" is a relative one generally used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function. (Citations.) It is commonly defined to mean a general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission. (Footnote omitted.) Such an interpretation is totally consistent with the declared legislative objective of public protection by requiring a minimum standard of professional conduct on the part of those licensed to engage in regulated activities. (Citation.) . . . the terms negligence and incompetency are not synonymous; a licensee may be competent or capable of performing a given duty but negligent in performing that duty. This fundamental conceptual distinction has long been recognized in California law (Citations) and in other jurisdictions (Citations). In defining a similar operative term in the context of an employer's liability for injury caused by an "incompetent" employee, our state Supreme Court has emphasized that basic distinction in explaining that "Incompetency connotes the converse of reliability . . ." (Citation) and that "a single act of negligence . . . may be attributable to remissness in discharging known duties, rather than . . . incompetency respecting the proper performance." (Citation.) The Legislature has consistently acknowledged that basic distinction in enacting and amending a number of regulatory statutes authorizing sanctions for either incompetence or negligence (Footnote omitted.) Thusly, to construe the one as merely synonymous with the other is inconsistent with general principles of construction requiring that meaning and effect be accorded to all of the statutory parts and that an interpretation of a statute be avoided which renders some of its words surplus. (Citations.)

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15. The *Pollok* court further stated:

> While it is conceivable that a single act of misconduct under certain circumstances may be sufficient to reveal a general lack of ability to perform the licensed duties, thereby supporting a finding of incompetency under the statute, we reject the notion that a single, honest failing in performing those duties—without more—constitutes the functional equivalent of incompetency justifying statutory sanctions. In so holding we engage neither in hyperbole nor strained interpretation of the underlying prophylactic purpose of the statutory scheme to assure compliance with professional standards of conduct for the protection of the public. (Citation.) (*Id.* at 839.)

16. The evidence established that Respondent met the criteria of dishonesty, gross negligence and incompetence. His license will be disciplined for all three.

17. Beginning in 1995, Respondent spent five years on probation for gross negligence arising out of allegations of dishonest and corrupt acts. Yet, that lengthy probationary period does not appear to have impressed upon him the paramount importance a physician and surgeon must place on his/her honesty and integrity. He was not only dishonest in his deposition testimony, he continued his dishonesty with respect to his qualifications and his resume in his interview with a Board investigator and medical consultant.

18. This is the second time Respondent has been charged with dishonesty, gross negligence and incompetence. He admitted gross negligence in the first action. His failure to learn from his mistakes, his dishonesty in this matter, his continued gross negligence and incompetence, his failure to offer any evidence of mitigation, extenuation or rehabilitation, and the extensive aggravating factors in this case bode poorly for the health, safety, welfare and interest of the public. Respondent's medical certificate must be revoked.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Physician's and Surgeon's Certificate No. G 26212, issued to Respondent Seymour P. Kern, M.D., is revoked.

DATED: March 9, 2009

H. Stuart Waxman

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: SEYMOUR P. KERN, M.D. PMB 360 7040 Avenida Encinas, #104 Carlsbad, California 92009 Physician and Surgeon's Certificate G-26212, Respondent.	Case No. 06-2004-158427 **ACCUSATION**

Complainant alleges:

PARTIES

1. David T. Thornton (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs.

2. On or about December 24, 1973, the Board issued Physician and Surgeon's Certificate Number G 26212 to Seymour P. Kern, M.D. (Respondent). This license was in full force and effect at all times relevant to the charges brought herein and will expire on August 31, 2007, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board's Division of Medical Quality

(Division) under the authority of the provisions of the California Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

5. Section 2234 of the Code states:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

"(d) Incompetence.

"(e) The commission of any act involving dishonesty or corruption which is

substantially related to the qualifications, functions, or duties of a physician and surgeon.

"(f) Any action or conduct which would have warranted the denial of a certificate."

LASIK EYE SURGERY DESCRIBED

6. LASIK is an acronym for **La**ser-assisted In **Si**tu **K**eratomileusis. It is a form of refractive laser eye surgery performed by ophthalmologists to correct vision and to reduce a patient's dependency on glasses or contact lenses. The procedure permanently changes the shape of the cornea, the clear covering of the front of the eye. Lasik is usually a preferred alternative to photorefractive keratectomy, PRK, as it requires less time for full recovery, and the patient experiences less pain overall.

7. The LASIK technique was made possible by the development around 1970 of a device, a microkeratome, used to cut thin flaps in the cornea and to alter its shape, in a procedure called Keratomileusis.

8. LASIK surgery was developed in 1990 by Dr. Lucio Buratto (Italy) and Dr. Ioannis Pallikaris (Greece) as a melding of two prior techniques, keratomileusis and photorefractive keratectomy. It quickly became popular because of its greater precision and lower frequency of complications compared with those techniques.

9. In 1991, LASIK was performed for the first time in the United States by Drs. Stephen Brint and Stephen Slade. The same year, Drs. Thomas and Tobias Neuhann successfully treated the first German LASIK patients with an automated microkeratome.

10. Before the surgery, the surfaces of the patient's corneas are examined with a computer-controlled scanning device to determine their exact shape. Using low-power lasers, it creates a topographic map of the cornea. This process also detects astigmatism and other irregularities in the shape of the cornea. Using this information, the surgeon calculates the amount and locations of corneal tissue to be removed during the operation. The patient typically is prescribed an antibiotic to start taking beforehand, to minimize the risk of infection after the procedure.

11. The operation is performed with the patient awake and mobile; however,

the patient typically is given a mild sedative (such as Valium or diazepam) and anesthetic eye drops. Lasik is performed in two steps. The initial step is to create a flap of corneal tissue. This process is achieved with a mechanical microkeratome using a metal blade, or a laser microkeratome that creates a series of tiny closely arranged bubbles within the cornea.[4] A hinge is left at one end of this flap. The flap is folded back, revealing the stroma, the middle section of the cornea.

12. The second step of the procedure is to use an excimer laser to remodel the corneal stroma. The laser vaporizes tissue in a finely controlled manner without damaging adjacent stroma by releasing the molecular bonds that hold the cells together. No burning with heat or actual cutting is required to ablate the tissue. The layers of tissue removed are tens of micrometers thick.

13. Currently manufactured excimer lasers use a computer system that tracks the patient's eye position up to 4,000 times per second, redirecting laser pulses for precise placement. After the laser has reshaped the cornea, the Lasik flap is repositioned over the treatment area by the surgeon. The flap remains in position by natural adhesion until healing is completed.

14. Performing the laser ablation in the deeper corneal stroma and under the Lasik flap "fools" the cornea into not knowing that it has had surgery. The wound response is muted, thus the patient is typically provided rapid visual recovery and virtually no pain.

FIRST CAUSE FOR DISCIPLINE

(Dishonest or Corrupt Acts)

15. Respondent is subject to disciplinary action under section 2234, subdivision (e) of the Code in that he committed dishonest or corrupt acts substantially related to the qualifications, functions, or duties of a physician and surgeon while presenting himself as an expert medical witness in a civil litigation matter. The circumstances are as follows:

A. In 2003, Respondent was the expert medical witness for the plaintiff in a civil case entitled *Chris Carlisle v. Andrew Castner, M.D., et al.*, Los Angeles Superior Court Case No. SC 070593. In that case, the plaintiff alleged that the defendant was

negligent when he performed LASIK vision correction surgeries which resulted in impairment of the plaintiff's vision. Respondent testified in a deposition on the plaintiff's behalf regarding the applicable standard of care in LASIK surgery. He also testified that he was the inventor of LASIK surgery and that he had a patent for it.

B. Respondent testified that a patient wearing hard or gas permeable contact lenses may have a "compressed cornea" and that cutting a flap (as one would do for LASIK) on that cornea releases a lot of hidden stresses and forces that cause the cornea to "pop" back close to its original shape. However, there is no scientific or physiological data to support this theory.

C. Respondent also testified that the standard of practice is that refractive surgeons should routinely under-correct patients that are long time contact lens wearers. However, there is no medically accepted data or scientific literature to support this statement.

D. Respondent claimed in his deposition, "I'm actually the inventor of the laser procedure myself. The LASIK is my patent." In fact, respondent did not invent the LASIK procedure, the history of which is commonly known. The first LASIK procedure was done in 1989 in Greece by Pillikaris, who actually named the procedure LASIK.

E. Respondent claims, and testified in his deposition, that he has a patent for LASIK. In fact, respondent's patent is not for LASIK and has nothing to do with LASIK surgery. Respondent mentions in his patent the use of a laser to shape a lens blank or to create a recess in the cornea for a milled blank. LASIK does not use outside tissue nor does it remove tissue that would be replaced. Rather, an excimer laser is used to remove tissue for refractive purposes from the cornea while in its normal place (in situ). Nothing is added to the eye.

F. Respondent claims he is an expert in LASIK laser eye surgical techniques and he testified in his deposition that he had performed over 15,000 refractive procedures. Respondent later stated that he has not actually done a LASIK surgery procedure on his own, but that he was an "assistant." However, LASIK is a procedure that does not

generally require an assistant.

SECOND CAUSE FOR DISCIPLINE

(Gross Negligence)

16. Respondent is subject to disciplinary action under section 2234, subdivision (b) of the Code in that his conduct in making untrue and misleading statements on a medical topic under oath constitute an extreme departure from the standard of practice. The facts and allegations set forth in Paragraph 15 above are incorporated here as if fully set forth.

THIRD CAUSE FOR DISCIPLINE

(Incompetence)

17. Respondent is subject to disciplinary action under section 2234, subdivision (d) of the Code in that his acts as set forth above demonstrate a lack of basic medical knowledge. The facts and allegations set forth in Paragraph 15 above are incorporated here as if fully set forth.

FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

18. Respondent is subject to disciplinary action under section 2234 of the Code in that he engaged in unprofessional conduct. The facts and allegations set forth in Paragraph 15 above are incorporated here as if fully set forth.

DISCIPLINE CONSIDERATIONS

19. To determine the degree of discipline, if any, to be imposed on respondent, Complainant alleges that on or about April 29, 1995, in a prior disciplinary action entitled *In the Matter of the Accusation against Seymour P. Kern, M.D.*, the Medical Board of California issued a decision in which his license was revoked. However, the revocation was stayed and respondent's license was placed on probation for five years with certain terms and conditions. That decision is incorporated by reference as if fully set forth.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Division of Medical Quality issue a decision:

1. Revoking or suspending Physician and Surgeon's Certificate Number G 26212 issued to Seymour P. Kern, M.D.;

2. Revoking, suspending or denying approval of his authority to supervise physician's assistants pursuant to section 3527 of the Code;

3. Ordering him to pay the Division of Medical Quality the costs of probation monitoring if placed on probation;

4. Taking such other and further action as deemed necessary and proper.

DATED: May 18, 2006

DAVID T. THORNTON
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant